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No. 01-1325

Supreme Court, U.S.
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In The
Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, ALLEN D. BROWN, DENNIS H. DAUGS, GREG HAYES, and L. DIAN MAXWELL,

Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON; KATRIN E. FRANK, in her official capacity as President of the Legal Foundation of Washington; and GERRY L. ALEXANDER, BOBBE J. BRIDGE, THOMAS CHAMBERS, FAITH IRELAND, CHARLES W. JOHNSON, BARBARA A. MADSEN, SUSAN OWENS, and CHARLES Z. SMITH, in their official capacities as Justices of the Supreme Court of Washington,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

DENNIS J. HERRERA
City Attorney
ANDREW W. SCHWARTZ
Counsel of Record
SUSAN CLEVELAND-KNOWLES
ELLEN FORMAN
Deputy City Attorneys
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4603
(415) 554-4620

JOHN D. ECHEVERRIA
GEORGETOWN ENVIRONMENTAL LAW & POLICY INSTITUTE
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9850

Attorneys for Amicus Curiae City and County of San Francisco

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INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus curiae City and County of San Francisco urges the Court to affirm the decision of the United States Court of Appeals for the Ninth Circuit that the Washington IOLTA program does not effect a taking. San Francisco supports the arguments of respondents and other *amici* that these claims do not fall into the "relatively rare" and "easily identified" *per se* category of physical occupations of private property, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465, 1479 (2002), and that these claims also fail under the test of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) based on the facts and circumstances of this case. This brief, however, focuses on the second issue on which the Court has granted *certiorari*: the potential remedy if a taking had occurred.

While petitioners acknowledge the general rule that injunctive relief is not available to remedy an alleged taking, they contend that they are entitled to seek injunctive relief in this case. They principally argue that (1) the Court should assume that the Washington Supreme Court would not have intended for the disciplinary rules at issue in this case to stay in effect if the rules were found to effect a taking, and (2) they are entitled to seek injunctive (and compensatory) relief in this federal court case because it would have been futile for petitioners to seek compensatory relief in Washington state court. The Court should reject both arguments because they contradict longstanding Court precedent and basic, important limitations on the scope of the Takings Clause. Petitioners also suggest that they are entitled to an injunction because the disciplinary rules are "arbitrary." The Court should reject that

theory because the Takings Clause is not a proper constitutional basis for challenging arbitrary or other wrongful government conduct.

ARGUMENT

I. MONEY DAMAGES IS THE EXCLUSIVE REMEDY FOR A TAKING.

The plain language of the Takings Clause, "... nor shall private property be taken for public use without just compensation," U.S. Const. amend. V, requires that payment of compensation, not equitable relief, be the sole remedy for a taking. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987). Monetary compensation is the appropriate remedy for a taking, whether the claim involves real or personal property, money, or any other type of property. The Takings Clause is a "peculiar[]" constitutional provision insofar as it

> requires just (*i.e.*, full) compensation, *see, e.g.*, *United States v. 564.54 Acres of Monroe and Pike County Land*, 441 U.S. 506, 510 (1979) (owner must be put "'in as good a position pecuniarily as if his property had not been taken'"); *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 326 (1893) ("[T]he compensation must be a full and perfect equivalent for the property taken"). . . .

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 748 (1997) (Scalia, J., concurring).

Before *First English*, certain courts, including the California Supreme Court, ruled that money damages were not available for violations of the Takings Clause. *See*

Agins v. Tiburon, 598 P.2d 25, 30-31 (1979), *aff'd*, 447 U.S. 255 (1980). The property owner's only legal recourse was to ask a court to invalidate the government action. In *First English*, this Court overruled the California Supreme Court:

> [The Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the "constitutional obligation to pay just compensation."

482 U.S. at 314-15 (emphasis original, citations omitted).

Based on this reasoning, the Court determined that if a regulation effects a taking of property, then the government may either rescind the regulation or leave it in place. If the government elects to rescind the regulation, then the government must pay just compensation for the temporary taking of the property from the date the government imposed the regulation until its removal. *See id.* at 318-20 & n.10; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031 n.17 (1992). If the government chooses to leave the regulation in place, then it must pay the owner just compensation for the permanent taking of the property. *See First English*, 482 U.S. at 318-20; *Tahoe-Sierra*, 122 S.Ct. at 1482 ("*First English* was certainly a significant decision, and nothing that we say today qualifies its holding.").

Thus, *First English* teaches that money damages for a taking are mandatory. 482 U.S. at 314. Invalidation of the regulation is not a constitutionally adequate remedy, and, indeed, is not a remedy available to the plaintiff at all. *See id.* at 321; *see also Tahoe-Sierra*, 122 S.Ct. at 1482 (once taking has been established, "no subsequent action by the government can relieve it of the duty to provide compensation") (quoting *First English*, 482 U.S. at 321). The *First English* rule is consistent with this Court's earlier decision in *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986 (1984), where the Court held that "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to a taking." *Id.* at 1016; *accord United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-28 (1985); *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990).

II. PETITIONERS FAIL TO ESTABLISH AN EXCEPTION TO THE RULE THAT EQUITABLE RELIEF IS NOT AVAILABLE FOR A TAKING.

A. Equitable Relief is Not Available on the Theory that the Government Would Not Have Intended to Maintain the Program If It Knew that a Taking Would Result.

Petitioners acknowledge the general rule that equitable relief is not available to enjoin an alleged taking. But petitioners contend that the Court should recognize and apply an exception to this general rule, on the theory that it would be "utterly pointless" to require the government, in a case involving the alleged taking of money, to refund

money it has taken. Brief for Petitioners at 40. Petitioners contend that a legislature – or, in this case, the Washington Supreme Court – should be presumed to have intended for the monetary appropriation to be halted, rather than be required to pay compensation, if its regulation were deemed a taking. Petitioners are mistaken for two reasons.

First, petitioners' exception would swallow the rule. They contend that it would be "utterly pointless" to require them to seek compensation. But in every regulatory takings case, it equally could be contended that it would be "pointless" to enter a judgment requiring the payment of compensation. Whenever the government adopts a police power regulation, whether directed at real property or personal property, it is operating on the assumption that it can proceed without paying.

In *First English*, the Court emphasized that the government has the option of rescinding a regulation determined to effect a taking, reflecting the theory that the government might well not wish to enforce a regulation if it effects a compensable taking. But the Court did not suggest that requiring the government to take positive action to reverse the taking and avoid the obligation to pay compensation was an unnecessary or "pointless" exercise. Likewise in this case, it would not be pointless to require the Washington Supreme Court to rescind the disciplinary rules to avoid the obligation to pay compensation, if a taking had been established.

Second, petitioners wrongly rely on *Eastern Enterprises, Inc. v. Apfel*, 524 U.S. 498 (1998), to support their contention that the Court already adopted the proposed exception. Petitioners read too much into that case. *Eastern Enterprises* involved the constitutionality of the

Coal Industry Retiree Health Benefit Act. The Act required coal mining companies to pay money into health care funds for the benefit of their former employees. A four-justice plurality concluded that the Act worked a taking because it imposed an extreme, retroactive financial burden on the claimant. *Id.* at 529-37.

Petitioners rely on the plurality opinion. Brief for Petitioners at 45, citing plurality opinion in *Eastern Enterprises,* 524 U.S. at 519-22. But the five justices who did not join in the plurality opinion concluded, on several different grounds, that the allegations by the plaintiffs did not support a viable taking claim. *Id.* at 545 (Kennedy, J., concurring and dissenting); *id.* at 554-55 (Breyer, J., dissenting).[1] Because these five justices concluded that the Takings Clause did not even apply, it can hardly be inferred, as petitioners contend, that these justices implicitly acquiesced in the plurality's conclusion about what type of remedy would have been available if a taking had occurred. Brief for Petitioners at 39 and n.18. In fact, Justice Kennedy explicitly repudiated any such implication in advance. *See id.* at 547 ("Given my view that the takings

[1] The Federal Appeals Courts have uniformly followed the views expressed by the majority in *Eastern Enterprises*. *Commonwealth Edison Company v. United States*, 271 F.3d 1327 (Fed. Cir. 2001), *cert. denied*, 122 S.Ct. 2293 (2002) (["F]ive justices of the Supreme Court in *Eastern Enterprises* agreed that regulatory actions requiring the payment of money are not takings. We agree with the prevailing view that we are obligated to follow the views of that majority."); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3d Cir. 1999), *cert. denied*, 528 U.S. 963 (lower courts "are bound to follow the five-four vote (in *Eastern Enterprises*) against the takings claim. . . ."); *Kitt v. United States*, 277 F.3d 1330, 1336-37, *mod. on other grounds*, 288 F.3d 1355 (Fed. Cir. 2002) (same).

analysis is inapplicable in this case, it is unnecessary to comment upon the plurality's effort to resolve a jurisdictional question despite little briefing by the parties on a point which has divided the Courts of Appeals.") Thus, *Eastern Enterprises* does not support petitioners' exception to the general rule.

Indeed, the reasoning of the five justices in *Eastern Enterprises* undermines the analysis of the plurality on the remedy issue. As highlighted by petitioners (at 41), the plurality pointed to the fact that, in several prior cases involving alleged takings of money, the Court had assumed the availability of injunctive relief, citing, among other decisions, *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), and *Connolly v. Pension Benefit Guarantee Corp.*, 475 U.S. 211 (1986). However, Justice Kennedy, in his concurring opinion, and the four dissenting justices strongly suggested that these decisions were incorrect insofar as they treated the claims as raising viable takings issues. *See* 524 U.S. at 547 (Kennedy, J., concurring and dissenting) ("These authorities confirm my view that the case is controlled not by the Takings Clause but by well-settled due process principles respecting retroactive laws."); *id.* at 555-56 (Breyer, J., dissenting) (also dismissing *Concrete Pipe* and *Connolly* as authoritative takings precedents). Because a majority of the Court has repudiated these decisions as takings precedents, they hardly can be invoked to demonstrate a general practice of making equitable relief available in this type of case.

The plurality in *Eastern Enterprises* also pointed to *Babbitt v. Youpee*, 519 U.S. 234 (1997) and *Hodel v. Irving*, 481 U.S. 704 (1987) as instances in which the Court

granted equitable relief in takings cases without discussing the claimant's obligation to seek compensation. But *Babbitt* and *Hodel* merely imply that equitable relief is available without directly addressing the issue. Nor do these decisions acknowledge the Court's contrary precedents. *See First English*, 482 U.S. at 314; *Ruckleshaus*, 467 U.S. at 1016; *Riverside Bayview Homes*, 474 U.S. at 127-28; *Preseault*, 494 U.S. at 11.

B. The Asserted Unavailability of Compensation in State Court Does Not Transform the Type of Relief Available for a Taking in Federal Court.

Petitioners' second basis for arguing that equitable relief should be available in this case is that the Ninth Circuit determined that it would be futile to pursue compensation in the Washington State Courts. *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 851 (9th Cir. 2001), *cert. granted*, 122 S.Ct. 2355 (2002). As a result, according to petitioners, they are entitled to sue in federal court and to seek both compensatory relief and equitable relief in this forum. In other words, petitioners contend that by moving a takings claim from state court to federal court, petitioners have been empowered to seek a broader array of relief than they would be entitled to seek in state court. The argument is wrong and should be rejected.[2]

[2] San Francisco questions the Ninth Circuit's conclusion that pursuit of just compensation in the Washington State Courts would be "futile." *See, e.g., Austin v. City and County of Honolulu*, 840 F.2d 678, 681 (9th Cir. 1988), *cert. denied*, 488 U.S. 852 (1988) (to go directly to

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Petitioners confuse choice of forum with choice of remedy. Under *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985), a claim for compensation is not ripe for consideration in federal court so long as state procedures for obtaining compensation are available. On the other hand, if compensation is unavailable or inadequate, the claimant may sue for compensation in federal court, assuming that the claim is otherwise ripe under *Williamson County's* final decision requirement and the claimant satisfies other jurisdictional requirements. *Id.* at 196. To this extent, assuming that petitioners are correct that compensation for a taking in the state forum is unavailable, they would be entitled to proceed with the case in federal court.

On the other hand, the opportunity to sue for a taking in federal court does not somehow transform the relief available. Petitioners cite no precedent to support their interpretation of the interplay between state and federal court jurisdiction with respect to takings claims. And the argument contradicts "[t]h[e] basic understanding of the . . . [Takings Clause] that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English*, 482 U.S. at 315 (emphasis original).

federal court, takings claimant must show that it "may not obtain just compensation through an inverse condemnation action under any circumstances . . . ."); *Samaad v. City of Dallas*, 940 F.2d 925, 934 (5th Cir. 1991) ("[I]t must be certain that the state *would* deny that claimant compensation were he to undertake the obviously futile act of seeking it.") (emphasis original). Whether this case was improperly filed in federal court, however, is not at issue in this appeal.

The petitioners' claim to equitable relief is based in part on the Ninth Circuit's confused decision in *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095 (9th Cir. 1998). *See Washington Legal Foundation*, 271 F.3d at 851 (citing *San Remo Hotel* for the right to file takings claim directly in federal court where state compensation remedy is inadequate); Brief for Petitioners at 44 (same). In *San Remo Hotel*, the Ninth Circuit decided that a claimant asserting a facial claim that a regulation fails to "substantially advance legitimate state interests" need not exhaust state compensation remedies and may proceed directly to federal court. That ruling was based on the Ninth Circuit's assumption that a substantially advance claimant may elect injunctive relief rather than money damages. *Id.* at 1101-02 ("denial of just compensation is irrelevant" for purposes of state compensation requirement). No other Circuit Court of Appeals has adopted this novel proposition.

San Remo Hotel is flawed for three reasons. First, as discussed below in Part II.C., in light of the reasoning of the five-justice majority in *Eastern Enterprises*, it is clear than an allegation that a government action fails to substantially advance legitimate state interests states a claim under the Due Process Clause, not the Takings Clause. Second, *San Remo Hotel*'s reasoning directly conflicts with this Court's many pronouncements that the sole remedy for takings is monetary compensation. *E.g.*, *First English*, 482 U.S. at 314. Third, opening the federal courts to takings claimants who fail to exhaust state compensation remedies is flatly inconsistent with *Williamson County*, which requires *all* takings claimants to exhaust state compensation remedies before proceeding to federal court under the Fifth Amendment. 473 U.S. at 195

("[B]ecause the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.").

The *San Remo Hotel* panel's error in permitting property owners to skirt the state compensation requirement for facial "substantially advance" claims can be traced to that court's reliance on *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996), *cert. denied*, 523 U.S. 1059 (1998). *Sinclair Oil* in turn mistakenly relied on *Yee v. City of Escondido*, 503 U.S. 519 (1992). *See Sinclair Oil*, 96 F.3d at 407. In *Yee*, this Court held that a facial takings challenge to mobilehome rent control was ripe under the *final decision* prong of *Williamson County*. *Id.* at 534; *see Williamson County*, 473 U.S. at 186. *Yee* did not address the *state compensation* ripeness prong of *Williamson County*, nor was that issue before the Court. The Court granted *certiorari* in *Yee* after the plaintiffs had exhausted their state compensation remedy in a state court action. *Id.* at 525-26.

Petitioners' reliance on *San Remo Hotel* for the right to elect an equitable remedy for a takings claim is therefore misplaced. Both petitioners' position and the Ninth Circuit policy to allow equitable relief for certain types of takings claims should be rejected.

C. An Injunction is Generally Appropriate Relief for "Arbitrary" Government Action, But a Claim Under the Takings Clause Is Not Available for Arbitrary Action.

Petitioners also appear to argue that they are entitled to injunctive relief under the Takings Clause because the disciplinary rules at issue in this case are "arbitrary." As a general matter, San Francisco does not dispute that "arbitrary" government actions are subject to judicial injunctions in appropriate cases, taking into account the normal degree of deference courts owe the other branches of government. The fundamental problem with petitioners' argument for injunctive relief (assuming the claim of arbitrariness could be substantiated), however, is that an arbitrary government action may violate some other provision of the Constitution, or some other provision of law, but it cannot constitute a taking.

The Court resolved this issue in *Eastern Enterprises*. In that case, Justice Kennedy concluded that the Coal Industry Retiree Health Benefit Act was "arbitrary" and had to be "invalidated as contrary to essential due process principles." 524 U.S. at 539. On the other hand, precisely because the suit involved an allegation of arbitrary action, he concluded that the Takings Clause did not apply. Justice Kennedy acknowledged that the Court had sometimes indicated a taking can occur if the government action does not "substantially advance legitimate state interests," *see, e.g., Agins v. City of Tiburon*, 447 U.S. at 260, but observed that "[t]his sort of analysis is in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the government's power to act." Based on his reading of the Court's "equivocal" precedents, he

opined "that we should proceed first to general due process principles, reserving takings analysis for cases where the governmental action is otherwise permissible." Justice Kennedy concluded by observing that, because "the constitutionality of the Coal Act appears to turn on the legitimacy of Congress' judgment rather than on the availability of compensation, . . . the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause." 524 U.S. at 545-46.

In dissent, Justice Breyer and three other Justices agreed that review of the arbitrariness of government action is governed by the Due Process Clause instead of the Takings Clause. Like Justice Kennedy, they agreed that: "[T]he plurality views this case through the wrong lens. The Constitution's Takings Clause does not apply." *Id.* at 554 (Breyer, J., dissenting). These four justices emphasized that "at the heart of the [Takings] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing compensation for legitimate government action that takes 'private property' to serve the 'public' good." *Id.* There is "no need to torture the Takings Clause" to accommodate claims of arbitrariness because these issues have a "natural home in the Due Process Clause, a Fifth Amendment neighbor." *Id.* at 556.

To be sure, the following year in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), the Court upheld a takings award based on jury instructions that included the "substantially advance" formulation, but that decision cannot be read to repudiate the conclusion reached by a majority of the Court in *Eastern Enterprises*. The defendant city in *Del Monte Dunes* waived any objection to the jury instructions incorporating

the substantially advance test, and therefore the Supreme Court ruled that the city had no standing to challenge the test. *Id.* at 721-22. Thus, the fact that the Supreme Court upheld the finding of a taking in *Del Monte Dunes* has no precedential significance.

Furthermore, a careful reading of the different opinions in *Del Monte Dunes* demonstrates that the decision actually reinforces *Eastern Enterprises*. No member of the Court spoke in defense of the ostensible substantially advance takings test. In addition, five of the justices either wrote opinions, or joined in opinions, expressly reserving the question of the validity of the substantially advance test, indicating that the result in the case should not be taken as an endorsement of the test. *See* 526 U.S. at 732 n.2 (Scalia, J., concurring) ("As the Court explains, petitioner forfeited any objection to this standard, . . . and I express no view as to its propriety."); *id.* at 753 n.12 (Souter, J., dissenting) ("I offer no opinion here on whether *Agins* was correct in assuming that this prong of liability was properly cognizable as flowing from the Just Compensation Clause of the Fifth Amendment, as distinct from the Due Process Clauses of the Fifth and Fourteenth Amendments.").

In sum, *Eastern Enterprises* remains the last clear statement by the Court on whether allegations of arbitrary government action can support a viable takings claim. *Del Monte Dunes* supports (and certainly does not undermine) the conclusion that the substantially advance test is not a legitimate takings test. Petitioners should not be entitled to sue for any type of relief under the Takings Clause on the assumption that the disciplinary rules were arbitrary, because allegations of arbitrary government conduct do not state a takings claim.

III. BECAUSE PETITIONERS HAVE NOT SUFFERED ECONOMIC HARM THAT CAN BE COMPENSATED WITH MONEY DAMAGES, THEY ARE NOT ENTITLED TO RELIEF UNDER THE TAKINGS CLAUSE.

The foregoing analysis of the proper remedy for takings claims informs the issue of whether the IOLTA program effects a taking. It would be anomalous to find that a regulation constitutes a taking where the exclusive remedy for this type of constitutional violation is not appropriate based on the facts of the case.

Petitioners have suffered no harm that can be compensated by money. Only the petitioners who deposited money with attorneys or escrow companies have standing to claim that the IOLTA program has taken their property: the interest on their deposits. *See Washington Legal Foundation*, 271 F.3d at 847 (only petitioners who deposited money with title companies have standing to sue for a taking of the interest on their deposits). Because the program does not receive interest from accounts where the interest would exceed the administrative costs and bank fees, but for the IOLTA program, petitioners' principal would not generate any interest for petitioners. *See* Joint Appendix ("JA") 149; Washington Rule of Professional Conduct 1.14(c)(2) and (4); Washington Supreme Court Admission to Practice Rule 12.1(c)(2)(iii). Moreover, petitioners presented no evidence in the courts below that they have incurred higher escrow fees as a result of the IOLTA program. *See* JA 50-52, 87-88, 96-97, 100, 119, 121, 124, 131-33 (deposition testimony showing that petitioners have no evidence that escrow companies raised rates after IOLTA rules adopted). In fact, if petitioners were to be

paid compensation through this takings action, they would receive a windfall; they would receive interest that, absent the IOLTA program, they would not earn.[3]

As demonstrated above, the exclusive remedy for a taking is money damages. The IOLTA program of Washington did not damage petitioners in a manner that can be compensated with money. Accordingly, the IOLTA program cannot effect a taking of petitioners' property.[4]

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[3] Petitioners also derive a "reciprocity of advantage" from the IOLTA program that offsets the small amounts of interest they claim was taken from them. *See Tahoe-Sierra*, 122 S.Ct. at 1489 (rejecting takings challenge to land development moratorium imposed on all similarly situated property owners, in part because regulation conferred reciprocal benefits on all property owners so burdened in the form of enhanced property values). The advantages to petitioners and the scores of other depositors who participate in the program are several. The IOLTA program promotes equal access to justice. Thus, the program benefits petitioners by enhancing the integrity of and public confidence in the legal system. The program also protects clients' funds from misuse by their attorneys and escrow officers.

[4] After arguing at great length that they are entitled to pursue both injunctive and monetary relief in federal court, petitioners cryptically suggest that, in view of the States' Eleventh Amendment immunity, they should at least be entitled to pursue equitable relief alone. Brief for Petitioners at 47 n.23. Petitioners are correct in asserting that the states are immune from claims under the Takings Clause based on the Eleventh Amendment. *See Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 94 F.3d 996, 1005 (5th Cir. 1996), *cert. denied*, 521 U.S. 1121 (1997); *see generally* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 137 (1999) ("The United States Supreme Court, while adopting the view that the Just Compensation Clause is self-executing with respect to compensation, has never held that the Clause abrogates . . . sovereign immunity."). However, petitioners are incorrect in their assumption that because a claim for compensatory relief is barred, they

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CONCLUSION

The Court should affirm the decision of the Court of Appeals for the Ninth Circuit.

Dated: October 18, 2002

Respectfully submitted,

DENNIS J. HERRERA
City Attorney
ANDREW W. SCHWARTZ
Counsel of Record
SUSAN CLEVELAND-KNOWLES
ELLEN FORMAN
Deputy City Attorneys
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4603
(415) 554-4620

JOHN D. ECHEVERRIA
GEORGETOWN ENVIRONMENTAL LAW & POLICY INSTITUTE
GEORGTOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9850

Attorneys for Amicus Curiae
City and County of San Francisco

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should be permitted to seek an injunction in the alternative, for the Eleventh Amendment "does not merely constitute a defense to monetary liability . . . , it provides immunity from suit." *Federal Maritime Commission v. South Carolina State Ports Authority*, 122 S.Ct. 1864, 1877 (2002). Ultimately, however, it will be unnecessary for the Court to address the contours of Eleventh Amendment immunity in this case because petitioners have an adequate – indeed exclusive – compensation remedy in state court, *see* fn. 2, *supra*, and, in any event, petitioners have failed to establish any type of injury sufficient to demonstrate a taking.